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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DARTHEATUS LLOYD, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B200505 (Los Angeles County Super. Ct. No. BC342669)

APPEAL from a judgment of the Superior Court of Los Angeles County, Theresa Sanchez-Gordon, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and Appellant.

Thomas and Thomas, Michael Thomas; Greines, Martin, Stein & Richland, Martin Stein and Alison M. Turner for Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are those portions enclosed within double brackets, **[[ ]]** .

Plaintiff and appellant Dartheatus Lloyd (Lloyd) appeals a judgment following a grant of summary judgment in favor of his former employer, defendant and respondent County of Los Angeles (the County).

The essential issues presented are whether Lloyd's action is barred by a failure to exhaust administrative remedies, and if not, whether a triable issue of material fact exists so as to preclude summary judgment.

In the published portion of this opinion, we hold:

Lloyd's claim he suffered a retaliatory dismissal for whistleblower activity did not constitute a claim of discrimination on the basis of a "non-merit factor" within the meaning of rule 25.01 of the County's Civil Service Rules (rules). Therefore, Lloyd was not required to exhaust his administrative remedies under the County's internal rules.

We also hold Lloyd's causes of action alleging statutory violations of the Labor Code are not barred by his failure to exhaust the administrative remedy afforded by Labor Code section 98.7. There is no requirement that a plaintiff pursue the Labor Code administrative procedure prior to pursuing a statutory cause of action. (*Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 46, review den.; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1359, review den.)

We further hold Lloyd's common law tort claims against the County, alleging retaliation and wrongful termination in violation of public policy, are barred by Government Code section 815's elimination of common law tort liability for public entities. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.)

In the unpublished portion of the opinion, we address the merits of Lloyd's other causes of action. We conclude the County met its burden to establish a legitimate justification for its employment decisions, and that Lloyd failed to raise a triable issue of material fact as to whether the County's reasons were pretextual. Therefore, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Employment history*.

In 1991, Lloyd commenced his employment with the County. In 1995, he became a permanent heat and frost insulator. In June 2003, Lloyd was laid off. In March 2004, he was rehired as a temporary employee. He worked in that capacity until January 2006, until he was laid off for a second time.

2. *Pleadings*.

The operative second amended complaint, filed June 9, 2006, sets forth five causes of action against the County. The gravamen of the action is that Lloyd (1) was laid off initially, (2) rehired as a *temporary* employee, (3) kept in a temporary appointment for nearly two years, and then (4) was laid off for a second time, all in retaliation for his complaints about asbestos removal at Los Angeles County-USC Medical Center (LAC-USC) and his refusal to remove asbestos without being duly certified.

The first cause of action alleges retaliation in violation of public policy (Cal. Const., art. I, § 1). The second cause of action alleges retaliation in violation of whistleblower statues (Lab. Code, §§ 6310, 6311). The third cause of action alleges retaliation in violation of public policy (Cal. Const., art. I, § 8). The fourth cause of action alleges retaliation in violation of whistle blower statutes (Lab. Code, §§ 98.6, 1102.5, 6399.7 & Gov. Code, § 8547). The fifth cause of action alleges retaliation in violation of the public policy delineated in said statutes.

3. *Summary judgment proceedings*.

a. *Moving papers*.

On March 12, 2007, the County filed a motion for summary judgment, arguing Lloyd could not establish a prima facie case of retaliation. The County further contended it had legitimate, nondiscriminatory reasons for the adverse employment actions of which Lloyd complained.

Specifically, the County asserted Lloyd was laid off in 2003 because (1) there was a department-wide work-force reduction, part of an effort to reduce the budget for the County's Department of Health Services (Department); (2) the reduction affected the permanent heat and frost insulator positions; and (3) Lloyd was the least senior heat and frost insulator at the time of the reduction.

Thereafter, Lloyd was rehired in March 2004 as a *temporary* employee because (1) six months after Lloyd was laid off, the County realized it needed an additional heat and frost insulator at LAC-USC; (2) at that time, LAC-USC had a budget for an additional 1.7 temporary positions; and (3) the County rehired Lloyd because he was at the top of the re-hire list.

The County further contended it retained Lloyd in that capacity for nearly two years because various projects warranted Lloyd's continued employment.

Finally, Lloyd was laid off from his temporary appointment in January 2006 due to a lack of work.

b. *Opposition papers*.

In opposition, Lloyd asserted the following facts were undisputed: (1) he was illegally ordered to remove asbestos without proper certification; (2) he was twice fired for refusing to remove asbestos illegally; (3) the County retaliated against him by maintaining him in a temporary position exceeding 12 months, in violation of civil service rules; (4) he made numerous requests for an investigation into unlawful asbestos removal but the County failed and refused to conduct such an investigation; and (5) despite the existence of numerous job opportunities and openings, the County denied him permanent employment.

c. *Trial court's ruling*.

On June 1, 2007, the matter came on for hearing. The trial court granted the motion for summary judgment and orally delivered its ruling, as follows:

"There is no triable issue of fact that defendant had legitimate, nondiscriminatory reasons for its employment decisions. [¶] . . . [¶] Defendant has provided evidence of legitimate nonretaliatory reasons for plaintiff's terminations from permanent and

temporary employment. The termination from permanent employment was due to budget cuts. The termination of temporary employment was due to lack of work. Plaintiff has failed to produce evidence that the reasons were pretextual.

"There is no evidence of proximity in time between the protected activity, refusing to remove asbestos and making complaints that he was asked to remove asbestos. Plaintiff was first asked to remove asbestos in 2001, two years before his termination. Plaintiff refused to remove asbestos ten to 15 times before his termination. Plaintiff engaged in the protected activity repeatedly over two years before termination without consequences.

"As a temporary employee, plaintiff also refused to remove asbestos and within the first three months of employment, filed two complaints that he was being asked to illegally remove asbestos. However, he was not terminated as a temporary employee until January, 2007, well over a year after he filed his complaint.

"Plaintiff also claims he was not given permanent status. The evidence is undisputed that the job posting at the time of his termination was in error and withdrawn, that the funding for his temporary position was only for a temporary, not permanent, position, and that plaintiff's name would remain on the rehire list for one year. The positions plaintiff states that he was not offered were advertised in January, 2006, after a rehire list expired. Plaintiff has not alleged that he applied for those jobs. Defendant did not have the ability to make his temporary position permanent, nor would defendant offer plaintiff a job for which he did not apply.

"It is necessary for each of the causes of action that plaintiff establish he was subject to retaliation. As plaintiff has not raised a triable issue of fact to defeat defendant's legitimate, nondiscriminatory retaliatory reasons for its actions, the motion for summary judgment is granted."

Lloyd filed a timely notice of appeal from the judgment.

CONTENTIONS

Lloyd contends: he established a prima facie case of retaliation; the County failed to meet its burden to present a nonretaliatory justification for each of its four adverse employment decisions; his evidence created a factual issue as to whether the County's purported justifications for its adverse employment decisions were pretextual; and any exhaustion argument by the County is irrelevant.

The County contends summary judgment should be affirmed on the ground that Lloyd failed to exhaust his administrative remedies, and moreover, Lloyd failed to present evidence to create a triable issue of fact as to whether the County's reasons for its actions were a pretext for retaliation.

DISCUSSION

I. *Trial court properly rejected the County's claim that Lloyd was required to exhaust internal administrative remedies prior to filing suit.*[1]

Citing the rule of exhaustion of administrative remedies (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292; *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321), the County contends Lloyd was obligated to pursue internal administrative remedies pursuant to the County's civil service rules, and his failure to exhaust bars his entire action. The County's argument is meritless because Lloyd's claim he suffered discrimination based on *whistleblowing* is not governed by the internal rules on which the County relies. We agree with the trial court's resolution of this issue.

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[1] The issue of exhaustion of internal administrative remedies was raised in a demurrer by the County to the second amended complaint. The demurrer was overruled. The trial court ruled the civil service rule upon which the County relied did not apply to whistleblower retaliation claims. In view of that ruling, the County did not raise that issue in its motion for summary judgment. Nonetheless, the trial court's ruling on the demurrer is reviewable on the appeal from the final judgment. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 152, p. 229.) Therefore, although the County did not seek summary judgment on the ground that Lloyd failed to exhaust his internal administrative remedies, the County is entitled to argue this issue on appeal as a basis for affirmance of the judgment.

Rule 4.01 provides in relevant part: "Right to petition for a hearing. *Any employee or applicant for employment may petition for a hearing before the commission who is*: [¶] A. Adversely affected by any action or decision of the director of personnel concerning which *discrimination* is alleged as provided in Rule 25." (Italics added.)

Rule 25.01 provides: "Employment practices. A. No person in the classified service or seeking admission thereto shall be appointed, reduced or removed, or in any way favored or *discriminated against in employment* or opportunity for employment because of race, color, religion, sex, physical handicap, medical condition, marital status, age, national origin or citizenship, ancestry, political opinions or affiliations, organizational membership or affiliation, *or other non-merit factors*, any of which are not substantially related to successful performance of the duties of the position. *'Non-merit factors' are those factors that relate exclusively to a personal or social characteristic or trait and are not substantially related to successful performance of the duties of the position.* Any person who appeals alleging discrimination based on a non-merit factor must name the specific non-merit factor(s) on which discrimination is alleged to be based. *No hearing shall be granted nor evidence heard relative to discrimination based on unspecified non-merit factors.*" (Italics added.)

The County contends a claim of retaliation for whistleblower activity is discrimination on the basis of a "non-merit factor" within the meaning of rule 25.01. In support, the County relies on *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476 (*Shuer*), which held an employee's complaint that her dismissal was retaliatory was a complaint of discrimination based on a non-job-related factor and thus cognizable by that county's civil service commission. (*Id*. at p. 485.)

However, the County's attempt to equate rule 25.01 with the provision considered by the *Shuer* court is unpersuasive. There, "[t]he charter and rules repeatedly state that all employment decisions must be made on the basis of '*job related qualifications*, *merit* and equal opportunity without regard to age, color, creed, disability, national origin, political affiliation, race, religion, sex, or any other *non-job-related factor*.' (San Diego County Charter, art. IX, § 901, italics added; Civil Service Rules, rule 6.1.1, italics

added.)" (*Shuer, supra*, 117 Cal.App.4th at p. 485.) Guided by that definition, *Shuer* found a decision to dismiss an employee "for revealing unethical or illegal conduct by county employees is to discriminate against her based on a non-job-related factor." (*Ibid.*)

In contrast, rule 25.01 contains its own definition of discrimination based on non-merit factors. Rule 25.01 was written much more narrowly than the provision construed by the *Shuer* court. Pursuant to rule 25.01, "*'Non-merit factors' are those factors that relate exclusively to a personal or social characteristic or trait* and are not substantially related to successful performance of the duties of the position." (Italics added.) Obviously, whistleblowing is *conduct* -- it is not a "personal or social characteristic or trait." Therefore, a claim of retaliation for whistleblower activity does not constitute discrimination on the basis of a non-merit factor within the meaning of rule 25.01.

Because Lloyd's claim he suffered a retaliatory dismissal for whistleblower activity does not fall within the ambit of rule 25.01, we reject the County's contention that Lloyd was required to exhaust said internal administrative remedy prior to filing suit.

II. *Lloyd's first, third and fifth causes of action, purporting to plead common law tort claims against the County, fail to state a cause of action.*

Turning to the operative second amended complaint, Lloyd's first cause of action alleges retaliation in violation of the public policy set forth in article I, section 1 of the California Constitution.[2] Specifically, Lloyd pled "Defendants retaliated against [him] by terminating his employment in 2003, by hiring him back in 2004 as a temporary employee, by keeping him as a temporary employee for over one year and by threatening to terminate his employment."

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[2] Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The third cause of action alleged retaliation in violation of the public policy contained in article I, section 8 of the California Constitution.[3] Specifically, Lloyd pled "Defendants retaliated against [him] by terminating his employment on or about January 27, 2006, effective on January 31, 2006."

The fifth cause of action, a *Tameny* claim,[4] alleged wrongful termination in violation of the public policy against retaliation for whistleblower activity, predicated on the public policies set forth in Labor Code sections 98.6, 1102.5 and 6399.7, and Government Code section 8547, relating to whistleblower activity.

It is unnecessary to address whether a triable issue exists with respect to these three causes of action because said causes of action against the County fail to state a claim. *Miklosy, supra*, 44 Cal.4th 876, is controlling.

Miklosy states: "The Government Claims Act (§ 810 et seq.) establishes the limits of common law liability for public entities, stating: '*Except as otherwise provided by statute:* [¶] (a) A public entity is *not liable* for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.' (§ 815, subd. (a), italics added.) The Legislative Committee Comment to section 815 states: 'This section *abolishes all common law or judicially declared forms of liability for public entities,* except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. . . . ' (Legis. Com. com., 32 West's Ann. Gov. Code (1995), foll. § 815, p. 167, italics added.) *Moreover, our own decisions confirm that section 815 abolishes common law tort liability for public entities*. (See *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179 [7 Cal.Rptr.3d 552, 80 P.3d 656]; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127-1128

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3 Article I, section 8 of the California Constitution provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." For purposes of this appeal, Lloyd concedes said constitutional provision would not support his claim.

4 *Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167.

[119 Cal.Rptr.2d 709, 45 P.3d 1171]; see also *Adkins v. State of California* (1996) 50 Cal.App.4th 1802, 1817-1818 [59 Cal.Rptr.2d 59]; *Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal.App.3d 859, 866-867 [247 Cal.Rptr. 504].)" (*Miklosy, supra,* 44 Cal.4th at p. 899, certain italics added.)

Therefore, "[Government Code] section 815 bars *Tameny* actions against public entities." (*Miklosy, supra,* 44 Cal.4th at p. 900.) Accordingly, Lloyd's fifth cause of action against the County, a *Tameny* claim for wrongful termination in violation of public policy, fails to state a claim. Lloyd's first and third causes of action, which purport to allege common law claims against the County for retaliation in violation of public policy, similarly are infirm. (*Ibid*.)

We recognize that notwithstanding the elimination of common law tort liability for public entities, they remain liable under the doctrine of respondeat superior for the actions of their employees. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) Irrespective of Government Code section 815's elimination of common law tort liability for public entities, a public employee generally is liable for an injury caused by his or her act or omission to the same extent as a private person (Gov. Code, § 820, subd. (a); *Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1127), and "when the act or omission of the public employee occurs in the scope of employment the public entity will be vicariously liable for the injury." (*Zelig, supra,* at p. 1127, citing Gov. Code, § 815.2.) Therefore, Lloyd asserts that even if the County cannot be held directly liable for his common law claims, the County may nonetheless be held liable for the actions of its employees within the course and scope of their employment under the respondeat superior doctrine.

The flaw in Lloyd's argument is that "a *Tameny* action for wrongful discharge can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort." (*Miklosy, supra,* 44 Cal.4th at p. 900.) Likewise, a "supervisor, when taking retaliatory action against the employee, is necessarily exercising authority the employer conferred on the supervisor . . . .

Thus, in a retaliation case, it is the *employer's adverse employment action* that constitutes the substance of the tort, and the supervisor's action merges with that of the employer." (*Id.* at pp. 901-902, fn. 8.)

Therefore, a common law *Tameny* cause of action for wrongful termination, or a claim of retaliation, lies only against the employer, not against the supervisor through whom the employer commits the tort. (*Miklosy, supra*, 44 Cal.4th at pp. 900-901.) Accordingly, the doctrine of respondeat superior has no application to Lloyd's common law claims against the County.

In sum, pursuant to the principles set forth in *Miklosy, supra*, 44 Cal.4th 876, Lloyd's first, third and fifth causes of action against the County are barred by Government Code section 815.

III. *Second and fourth causes of action alleging Labor Code violations*.

1. *With respect to 2nd and 4th causes of action for Labor Code violations, no requirement that plaintiff exhaust Labor Code administrative remedy*.

The County asks this court to hold that Lloyd's failure to exhaust the administrative remedy of Labor Code section 98.7 bars Lloyd's second and fourth causes of action for statutory violations of the Labor Code.

Labor Code section 98.7 provides in relevant part: "Any person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner *may file* a complaint with the division within six months after the occurrence of the violation." (*Id*., at subd. (a), italics added.) "Each complaint of unlawful discharge or discrimination shall be assigned to a discrimination complaint investigator who shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint." (*Id*., at subd. (b.) If the Labor Commissioner "determines a violation has occurred, he or she shall notify the complainant and respondent and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees . . . and the posting of notices to employees."

(*Id*., at subd. (c).) If the Labor Commissioner "determines no violation has occurred, he or she shall notify the complainant and respondent and shall dismiss the complaint. . . . *The complainant may, after notification of the Labor Commissioner's determination to dismiss a complaint, bring an action in an appropriate court*, which shall have jurisdiction to determine whether a violation occurred, and if so, to restrain the violation and order all appropriate relief to remedy the violation. Appropriate relief includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages and interest thereon, and other compensation or equitable relief as is appropriate under the circumstances of the case." (*Id*., at subd. (d)(1), italics added.) Finally, subdivision (f) of Labor Code section 98.7 provides: "*The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.*" (Italics added.) Therefore, it would appear Labor Code section 98.7 merely provides the employee with an additional remedy which the employee may choose to pursue.

Further, case law has recognized there is no requirement that a plaintiff proceed through the Labor Code administrative procedure in order to pursue a statutory cause of action. (*Daly v. Exxon Corp.*, *supra*, 55 Cal.App.4th at p. 46 [suit under Lab. Code, § 6310 alleging retaliation for complaint of unsafe working conditions]; *Murray v. Oceanside Unified School Dist*., *supra*, 79 Cal.App.4th at p. 1359 [suit under former Lab. Code, § 1102.1 relating to sexual orientation discrimination].) We see no reason to differ with these decisions and to impose an administrative exhaustion requirement on plaintiffs seeking to sue for Labor Code violations.

We make the additional observation that construing Labor Code section 98.7 to obligate a plaintiff to seek relief from the Labor Commissioner prior to filing suit for Labor Code violations flies in the face of the concerns underlying the Labor Code Private Attorneys General Act of 2004 (PAG Act) (Lab. Code, § 2698 et seq.). As we stated in *Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 337, the PAG Act was adopted to augment the enforcement abilities of the Labor Commissioner with a private attorney general system for labor law enforcement. "The Legislature declared its intent as

follows: '(c) Staffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future. [¶] (d) *It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general,* while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.' (Stats. 2003, ch. 906, § 1, italics added.)" (*Id.* at p. 337.) The PAG Act's approach, enlisting aggrieved employees to augment the Labor Commissioner's enforcement of state labor law, undermines the notion that Labor Code section 98.7 compels exhaustion of administrative remedies with the Labor Commissioner.

We now turn to the merits of Lloyd's second and fourth causes of action against the County.

2. *No triable issue of material fact with respect to second and fourth causes of action; the County met its burden to show a legitimate justification for its employment decisions and Lloyd failed to raise a triable issue with respect to whether the County's reasons were pretextual.*

[[Begin nonpublished portion.]]

[[a. *General principles.*

(i) *Standard of appellate review.*

Summary judgment "motions are to expedite litigation and eliminate needless trials. [Citation.] They are granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citations.]" (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 590.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc., §437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met

its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Ibid.*)

We review the trial court's ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co.* (1995) 34 Cal.App.4th 1047, 1050.)

(ii) *The parties' respective burdens*.

In the context of employment discrimination or retaliation, California has adopted the three-part burden-shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668]. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 (*Guz*); *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 110-112.)

Under "that framework, the plaintiff may raise a presumption of discrimination by presenting a 'prima facie case,' the components of which vary with the nature of the claim, but typically require evidence that '(1) [the plaintiff] was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]' (*Guz, supra,* 24 Cal.4th at p. 355.) A satisfactory showing to this effect gives rise to a presumption of discrimination which, if unanswered by the employer, is mandatory – it requires judgment for the plaintiff. (*Ibid.*) However the employer may dispel the presumption merely by articulating a legitimate, nondiscriminatory reason for the challenged action. [Citation.]" (*Reeves v. Safeway Stores, Inc., supra*, 121 Cal.App.4th at pp. 111-112.)

Once the employer has articulated a legitimate reason for the challenged action, the burden shifts back to the plaintiff to show that the employer's proffered reasons are a pretext for discrimination or retaliation. (*Guz, supra*, 24 Cal.4th at p. 356; *Patten v. Grant Joint Union High School Dist*. (2005) 134 Cal.App.4th 1378, 1384 [whistleblower retaliation claim under Lab. Code, § 1102.5].)

At this juncture, the County does not dispute that Lloyd met his prima facie burden. The issues before us are whether the County met its burden to present legitimate, nonretaliatory reasons for the adverse employment actions, and if so, whether Lloyd raised a triable issue as to whether the County's proffered reasons were pretextual.

b. *The County met its burden to present legitimate reasons for each of its challenged employment decisions*.

(i) *The 2003 layoff from permanent employment*.

The County asserted Lloyd was laid off in 2003 because (1) there was a department-wide work-force reduction, part of an effort to reduce the budget for Lloyd's department; (2) the reduction affected the permanent heat and frost insulator positions; and (3) Lloyd was the least senior permanent heat and frost insulator at the time of the reduction.

Lloyd contends the declaration of David Cochran, on which the County partially relied, fails to present admissible evidence in this regard because Cochran lacked personal knowledge of these facts. We note the trial court sustained Lloyd's objections to nearly the entirety of the Cochran declaration. Nonetheless, the trial court *overruled* Lloyd's objections to the declarations of Clarence Hampton and David Law. Those remaining declarations are sufficient to show a legitimate justification by the County for the 2003 layoff.[5]

(ii) *The 2004 rehire as a temporary employee*.

The County asserted below that it properly rehired Lloyd in March 2004 as a *temporary* employee because (1) six months after Lloyd was laid off, it realized it needed an additional heat and frost insulator at LAC-USC; (2) at that time, LAC-USC had a budget for an additional 1.7 temporary positions; and (3) the County rehired Lloyd

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5 Lloyd's opening brief, in a series of footnotes, contends the trial court failed to rule on his objections to the Cochran, Law and Hampton declarations. Lloyd seems to be unaware of the trial court's rulings on his evidentiary objections, even though the rulings appear at page 20 of the reporter's transcript. Lloyd's opening brief does not argue the trial court's evidentiary rulings were erroneous; he merely asserts, incorrectly, that the trial court failed to rule on his objections.

because he was at the top of the re-hire list.[6] This rationale is fully supported by the Hampton declaration, which is before us in its entirety.

Therefore, the County presented a legitimate justification for rehiring Lloyd as a temporary employee in 2004.

(iii) *Lloyd's status as a temporary employee for two years*.

The County's Civil Rule 13.03 provides in relevant part: "A temporary appointment may continue for no longer than 12 months of continuous, full-time service except that, with the approval of the director of personnel, persons may be employed in the same position for an additional specified period of time upon written presentation of facts to justify an extension."

The Hampton declaration states "After the Pediatric ICU was completed around December 2004, various additional projects warranted the continued employment of Mr. Lloyd on a temporary basis." This constitutes a legitimate justification for extending Lloyd's temporary appointment beyond the 12-month period.

(iv) *The 2006 layoff*.

Finally, the County argued it released Lloyd from his temporary appointment in January 2006 due to a lack of work.

The assertion is supported by the Hampton declaration, which states in relevant part: "By January 2006, Facilities Management was unable to justify continuing to employ Mr. Lloyd on a temporary basis, due to the lack of work, and he was released from his temporary appointment."

This constitutes a legitimate justification for the 2006 layoff.

In sum, the County presented a sufficient justification for each of the four adverse actions being challenged by Lloyd. The remaining issue is whether Lloyd raised a triable issue of material fact as to whether the County's stated reasons were a pretext for retaliation.

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[6] LAC-USC's budget at the time also allowed for three permanent heat and frost insulator positions; however, the three budgeted permanent positions were already filled by Catello, Meijer and Warren.

c. *Lloyd failed to raise a triable issue as to whether the County's reasons for its employment decisions were pretextual.*

Once the County presented substantial evidence of a legitimate, nonretaliatory reason for its actions, the burden shifted to Lloyd to produce substantial, responsive evidence that the County's showing was untrue or pretextual. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.) " '*To avoid summary judgment, [appellant] "must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses*." [Citation.] [He] must produce "*specific, substantial evidence of pretext*." [Citation.]' [Citation.] We emphasize that an issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture. [Citation.] We review the evidence presented to the trial court and independently adjudicate its effect as a matter of law. [Citation.]" (*Ibid.*, italics added.)

We address Lloyd's arguments regarding pretext, seriatim.

(i) *The 2003 layoff from permanent employment.*

As indicated, the County asserted Lloyd was laid off in June 2003 due to a workforce reduction. Lloyd contended the purported justification was pretextual based on various circumstances, discussed below.

On June 16, 2003, the same day Lloyd received his termination notice effective June 30, 2003, the County posted a job listing for a heat and frost insulator. However, the declaration of Theresa Aleman, the section manager of the Department's Recruitment and Exam Office, stated the examination for said position was cancelled on June 23, 2003 because the position was affected by a departmental workforce reduction. As the trial court found, the evidence showed the job posting was in error and was withdrawn.

Lloyd relies on the fact that Domingo Villanueva, the building craft manager, never saw any document showing a financial reason for his layoff. However, that circumstance does not give rise to an inference that no financial reason existed. This argument by Lloyd is based on mere conjecture.

Lloyd asserts the County provided no explanation as to why he was laid off. In fact, the June 16, 2003 notice specified Lloyd was being laid off due to financial constraints, in accordance with rule 19.

Lloyd emphasizes he was the only heat and frost insulator who was laid off, even though Warren performed no heat and insulator duties due to asbestosis and Catello performed no heat and insulator duties following his return from triple bypass surgery. However, Lloyd admitted that both Warren and Catello had greater seniority than he.

Lloyd relies on the fact that when Tesloff, the MLK facility director, indicated Lloyd would be laid off, Tesloff did not indicate whether any other individuals would be laid off. This fact does not support an inference that Lloyd's layoff was retaliatory.

Lloyd cites the fact that the County's budget report for the 2003-2004 fiscal year indicated a "0.7 vacant" heat and frost insulator position, meaning he could have worked as a part-time employee in June 2003. However, during that fiscal year, 1.7 temporary positions were budgeted. The full-time temporary position was filled by Lloyd. It is unclear how not giving Lloyd the temporary 0.7 position instead of the temporary full-time position constituted an adverse employment action.

As further evidence of pretext, Lloyd asserts he was repeatedly asked by his supervisors to remove asbestos even though they knew he was not certified to do so. This amounts to a prima facie showing by Lloyd that he engaged in protected activity; it does not tend to show the employer's justification for the layoff, namely, a workforce reduction, was pretextual.

Lloyd also argues his supervisors ignored his repeated complaints concerning their requests that he remove asbestos illegally, and that a grievance he filed in June 2003 was ignored. Again, this does not tend to show the employer's fiscal justification for the layoff was pretextual.

Lloyd also relies on a statement by Toby Morrie, an employee in human resources, who, upon reviewing the job posting for a heat and frost insulator on the day after Lloyd was told he would be terminated, told Lloyd to call one Ms. Miller if he did not get his job back. This advisement by Morrie does not support an inference the County's justification for the layoff was pretextual.

Lloyd also contends the grievance he submitted in June 2003 was ignored. However, Lloyd conceded he did not mention the asbestos issue in his grievance. Therefore, the disposition of his grievance does not support an inference he was laid off in retaliation for complaining of asbestos.

Finally, Lloyd cites the statement of Hampton, his supervisor when he returned to LAC-USC as a temporary employee. According to Lloyd's deposition testimony, Hampton told him that he "shouldn't have been laid off." The statement is unavailing to Lloyd because Hampton did not make the layoff decision. This statement by a nondecisionmaker "is entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus. [Citations.]" (*Horn v. Cushman & Wakefield Western, Inc*., *supra*, 72 Cal.App.4th at p. 809.)

(ii) *The 2004 rehire as a temporary, rather than a permanent, employee.*

In March 2004, the County rehired Lloyd as a temporary employee because it needed an additional heat and frost insulator at LAC-USC. Lloyd contends the decision to rehire him as a temporary, rather than permanent employee, was pretextual and was intended to punish him for complaining about the County's efforts to coerce him to remove asbestos illegally. We address Lloyd's pretext arguments seriatim.

Here, Lloyd reiterates the fact that simultaneous with the June 16, 2003 layoff, the County posted a job position for a heat and frost insulator. As already discussed, the declaration of Theresa Aleman established the job posting was erroneous and was withdrawn.

Lloyd relies again on the fact that for the 2003-2004 fiscal year, there were 3 permanent and 1.7 temporary positions budgeted. As discussed above, the 3 permanent positions were filled and Lloyd obtained the full-time temporary position. The fact there remained a 0.7 temporary position does not show pretext.

Lloyd also points to the fact that 30 days after he was rehired to work at LAC-USC, he was sent back to MLK to do the same work he was doing prior to his layoff. However, merely because Lloyd was performing the same work does not tend to show his rehiring as a temporary employee for budgetary reasons was pretextual.

Lloyd also relies on the fact that upon his return to MLK, he was again asked to do asbestos work on several occasions. This does not tend to show Lloyd's rehiring as a temporary employee for budgetary reasons was pretextual.

(iii) *Lloyd's status as a temporary employee for nearly two years.*

To reiterate, rule 13.03 provides in relevant part: "A temporary appointment may continue for no longer than 12 months of continuous, full-time service except that, with the approval of the director of personnel, persons may be employed in the same position for an additional specified period of time upon written presentation of facts to justify an extension."

The County contended it permitted Lloyd to work as a temporary employee for nearly two years because of the need to complete additional projects. Lloyd contends this lengthy stint as a temporary employee was a pretext for punishing him for complaining about the County's efforts to have him remove asbestos illegally.

As the County argues, it is unclear how Lloyd's continued employment as a temporary employee beyond the one-year mark could be deemed an adverse employment action, when the alternative would have been to let him go.

Further, the County could not simply change Lloyd's status from temporary to permanent at the end of the one-year period. Rule 13.03 specifically states: "A person given a temporary appointment may not be transferred or reassigned to any other position except on a temporary basis, *and shall never attain permanent status from such assignment*." (Italics added.)

Lloyd also contends the County violated Rule 13.03 because no one filled out the necessary paperwork to extend his temporary employment beyond the one-year mark. However, such omission by the County does not tend to show its retention of Lloyd as a temporary employee was pretextual.

Finally, Lloyd points to evidence that a permanent heat and frost insulator position opened in the Internal Services Department in 2005. The evidence showed Hampton told Lloyd about the position and gave him a copy of the bulletin. (As noted, rule 13.03 precluded the County from simply reassigning Lloyd from his temporary appointment into a permanent position.) The job bulletin advised Lloyd how to apply for the position. However, there is no indication that Lloyd made any attempt to apply for the open permanent position.

In short, Lloyd has not shown his retention by the County in a temporary position for nearly two years was a pretext for retaliation.

(iv) *The January 2006 layoff.*

The County contended it terminated Lloyd's temporary employment in January 2006 due to a lack of work at LAC-USC. Here too, Lloyd contends the proffered reason is pretextual.

Lloyd points to the fact that on January 19, 2006, just days before the County notified Lloyd that it would terminate his employment for a second time, the County posted a bulletin for a heat and frost insulator. However, this job posting was by the County's Internal Services Department. This opening in the County's Internal Services Department does not call into question the County's evidence that there was a lack of work for Lloyd at LAC-USC, within the County's Department of Health Services.

Lloyd points out that at the time he was terminated in January 2006, there was a temporary heat and frost insulator position budgeted for the 2005/2006 fiscal year at LAC-USC. The existence of budgeted positions does not equate with the availability of work to be done. Although said position was budgeted, the evidence showed there was a lack of work at LAC-USC and facilities management could not justify continuing Lloyd's temporary employment beyond January 2006.

To establish pretext, Lloyd also relies on his favorable performance reviews in 2004 and 2005, prior to his second termination. However, Lloyd's positive evaluations do not tend to show the County's justification for the second termination, namely, a lack of work at LAC-USC, was pretextual.

Finally, Lloyd argues he presented evidence that he was terminated about one month after he refused to sign his performance evaluation and had a meeting with supervisors, at which time he complained of his temporary status and the fact that he repeatedly was being asked to remove asbestos illegally. Proximity between protected activity and adverse action may be sufficient to establish a prima facie case of retaliation. (*Loggins v. Kaiser Permanente Internat*. (2007) 151 Cal.App.4th 1102, 1110, fn. 6; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353.) However, temporal proximity between protected activity and discharge does not raise a triable issue that the County's justification for the second termination, i.e., a lack of work at LAC-USC, was pretextual.

For all these reasons, we conclude Lloyd failed to raise a triable issue of material fact with respect to whether the County's justifications for the adverse employment actions were pretextual. **]]**

[[End of nonpublished portion.]]

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.